NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Maine Insurers Dodge a Bullet

BY HANNAH L. BASS AND LANCE E. WALKER

Recently, the 124th Maine Legislature considered proposed insurance legislation that would no doubt have had grievous consequences for insurers, as well as disturbed the long-standing landscape of personal injury and insurance litigation. The Maine Trial Lawyers Association drafted and lobbied heavily in favor of this bill. LD 1305, entitled "An Act to provide Prompt Resolution of Insurance Claims by Providing for a Direct Remedy by Consumers" had two major focuses. The bill allowed for "direct action" against insurers by claimants, explained below. In addition, it also created a private cause of action for anyone "injured by an unfair claim practice."

Background

To better appreciate how disastrous this proposed legislation would be for the insurance industry a summary review of current law follows. Maine law does not allow an injured third party to sue a tortfeasor's liability insurer directly to recover for his injuries. *Allen v. Pomroy,* 277 A.2d 727, 730 (Me.1971). Title 24-A M.R.S.A. § 2904, referred to as the "reach and apply" statute, allows a judgment creditor the exclusive mechanism to collect insurance proceeds from the defendant insurer to satisfy a final judgment obtained against the insured. This statute applies to all types of casualty insurance. The reach and apply statute requires, among other things, that the insurer have notice of the accident or occurrence, before recovery of the judgment. As such, an individual may not commence a reach and apply action until he obtains a final judgment against the insured that disposes of all matters in controversy.

Under the statute, an insurer is always able to advance a defense based on a substantive coverage provision found within the policy language, but is otherwise limited to specific enumerated defenses included in the statute such as fraud and collusion. Other states have similar laws, often called "garnishment" statutes. Many jurisdictions that do not have a similar statute allow for a liability insurer to be sued directly by the injured party prior to getting a final judgment against the insured, hence the name, "direct action" statute.

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Some states also allow the injured party to sue the insured and the insurer jointly.

With respect to first party claims in Maine, an insured can sue his own insurer directly for certain violations of the Unfair Claims Settlement Practices Act, 24-A M.R.S.A. 2463-A. The Act allows an insured to recover damages, interest and attorney's fees if the insurer, without just cause, fails to settle a claim, makes a misrepresentation or fails to settle or deny the claim within a reasonable time after the loss.

LD 1305

LD 1305 was directed at dramatically affecting the foregoing statutes, even though it did not expressly repeal them, and would have ultimately resulted in an adversarial system heavily favoring plaintiffs. There is little doubt that this legislation was motivated by a desire to leverage insurers into settling dubious claims for more than would otherwise be a fair value. The proposed legislation contained two major components, discussed below.

Unfair Trade Practices Claims Would Not Be Limited to First Party Actions

Unlike the Unfair Claims Settlement Practices Act, 24-A M.R.S.A. 2463-A, the first section of this bill allowed any person "injured by an unfair claim practice" to maintain an action against an insurer. Even more drastic than allowing such an action to proceed, the bill also allowed the individual to recover two to three times the actual damages should the court find that the act or practice was a willful or knowing violation or if it was made in bad faith. An individual would also have been able to recover his attorney's fees and costs incurred in connection with the filing of an action under this section. Lastly, and certainly not the least damaging, the bill provided that a claimant does not have to "initiate, pursue, or exhaust a remedy established by regulation, administrative procedure, local, state or federal law or statute or common law in order to bring an action under this section."

Not only was this portion of the bill a poorly drafted, thinly-veiled effort to pressure insurers to overvalue and settle questionable claims, it also essentially created a duty on the part of an insurer to someone other than the insured. This is fundamentally unfair, excessive and contradictory of basic contract principles. An insurer owes a duty only to its insured.

Injured Parties Could Bypass the Insured Altogether

LD 1305 also contained a "direct action" provision. In the context of a third-party claim, LD 1305 would have allowed an injured person to pursue a direct action against the insurer in certain arbitrary circumstances. Two of the circumstances concerned the solvency of the insured. Other circumstances included ones in which the insured is deceased or service of citation or other process cannot be made on the insured. In any of these circumstances, the insurer and the insured could also be sued jointly. Clearly, the intent of the direct action provision was to circumvent Maine Rule of Evidence 411, which provides that the existence of liability insurance is not admissible at trial because of the obvious risk of undue prejudice against the defendant.

The Committee on Insurance and Financial Services held a hearing earlier this year to consider the bill. The Committee heard testimony from the public including various professionals with expertise in insurance law. Attorney Jim Poliquin of our firm was asked to provide the Committee with his opinions concerning the propriety and consequences of such legislation.

The Committee ultimately issued an unanimous decision that the bill "Ought Not To Pass." Fortunately, when a legislative committee unanimously agrees that a bill "Ought Not To Pass" it is considered "dead" and can only be recalled from legislative files by a joint order approved by a two-thirds majority of both chambers. LD 1305, therefore, will not become law.

Had this legislation passed, it would have added a puzzling and illogical piece of damaging anti-insurer legislation to the already confusing statutory structure related to an individual's remedies against insurers. Now that the bill is dead, we are all breathing a little bit easier over here at NH&D and we hope you are too. □

NORMAN, HANSON & DETROY, LLC

newsletter

is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

Stephen W. Moriarty, Editor
Lorri A. Hall, Managing Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: lstinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

LANCE E. WALKER

Lance E. Walker

Norman, Hanson & DeTroy, LLC is pleased to announce that Lance E. Walker, who joined the litigation group as an associate in 2001, has been elected to membership in the firm as of January 1, 2009.

Lance grew up in Dover-Foxcroft, Maine. In law school Lance was a member of the Moot Court Board and was the recipient of the Edward T. Gignoux award for outstanding appellate advocacy as well as the award for outstanding trial advocacy. Lance was also selected as a legal writing instructor during his third year of law school.

Upon graduation from law school Lance served as law clerk to Justices Atwood, Studstrup and Marden of the Maine Superior Court.

Since joining the firm Lance's practice has focused on civil litigation with a specialty in insurance coverage matters. In addition to jury trial experience in the Maine Superior Court, Lance is a frequent consultant to insurance companies across New England on issues of complex insurance coverage matters.

Lance and his wife Heidi live in North Yarmouth with their daughter, Ava, while awaiting the arrival of Ava's little sister in September. □

CMS's Mandatory Reporting Law

BY: DORIS V.R. CHAMPAGNE

The Centers for Medicare and Medicaid Services (CMS) are stirring up a tempest among members of the insurance industry and those affiliated with them as the effective date for the Mandatory Insurer Reporting (MIR) laws draws near. The MIR is scheduled to take effect on July 1, 2009, and is formally known as Section 111 of the Medicare, Medicaid, and SCHIP Extension Act (MMSEA). Workers' compensation, liability, and no-fault insurers had their initial taste of the law on May 1, 2009, when the registration started.

The Mandatory Insurer Reporting (MIR) law is a 2007 amendment to the Medicare Secondary Payer (MSP) Act, which, among other things, makes Medicare the secondary payer for medical benefits when another "plan" (i.e., insurer) has primary payment responsibility for a claim and requires the settling parties to consider Medicare's interest by allocating settlement funds for future Medicare-covered medical services. The reporting law was enacted to serve a number of purposes, including (1) generating revenue through fines to fund the State Children Health Insurance Programs (SCHIP), (2) discover unresolved conditional payments and seek immediate recovery, (3) cease making conditional payments in the future, and (4) ensure that all settlements consider Medicare's interests. The essence of the reporting law is that it requires Responsible Reporting Entities (RRE)—including workers' compensation, liability, and group health insurers—to determine whether a claimant is entitled to Medicare. If a claimant is identified as a Medicare beneficiary, the RRE must notify Medicare once "the claim [involving the Medicare-eligible claimant] is resolved through a settlement, judgment, award or other payment." The obligation to report exists whether or not liability is admitted or determined upon the making of a payment in a given case. Reporting will be done electronically, and, thus, requires technical preparatory work on the part of RREs.

To help Responsible Reporting Entities (RREs) identify Medicare beneficiaries, CMS is offering RREs access to a Query Input File during the registration process. The Query Input File allows RREs to submit queries concerning a claimant's Medicare status using HIPAA-compliant software that will be provided by CMS, free of charge, upon request at registration. RREs must complete a testing phase on this program before actual queries can be sent or received. To send a query, RREs must provide CMS with the claimant's social security number or Health Insurance Claim Number (HICN); the first initial of the claimant's first name; the first six characters of the claimant's last name; the claimant's date of birth; and the claimant's gender. Query Input Files, which can contain multiple claimant queries, can be submitted only once per month per RRE ID number acquired by an RRE. Responses from CMS will be returned within 14 days after the submission. If an initial query result shows that the Claimant is not Medicare eligible, the RRE is obligated to monitor the claim to keep tabs on the claimant's Medicare status over time. RREs should also be sure to check the data they supplied to CMS if a negative response was returned.

This law has technically been in effect for years, and the industry has been very concerned about potential fines for past infractions. CMS has provided a generous concession in terms of the look-back period for reporting cases. Medicare has been a secondary payer insofar as workers' compensation cases are concerned since its enactment in 1965. As to all other cases, Medicare was the primary payer until December 1980. CMS could very well have required Insurers to go back a substantial period of time, therefore, in their case files to report cases that fall within the scope of the Mandatory Reporting law. Recognizing the impracticality of such a requirement, CMS has created an exception from reporting where an insurer has assumed ongoing responsibility for medical payments prior to 7/1/09 but the claim was "actively closed or removed from" the current claims records prior to 1/1/09.

DORIS V.R. CHAMPAGNE

CMS has also provided interim, *de minimus* dollar review thresholds for limited cases. To apply the review thresholds, RREs should understand two terms used by CMS, including cases involving the assumption of "ongoing responsibility for medicals" (ORM) and the making of a "total payment obligation to the claimant" (TPOC). ORM refers to cases involving an RRE's assumption of ongoing responsibility for medical payments on behalf of a claimant, whether or not liability is accepted. TPOC refers to the dollar amount of a settlement, judgment, award, or other payment in addition to, or apart from, ORM.

In terms of the review threshold for reporting ORM, there are no *de minimus* dollar exceptions for no-fault or liability insurance RREs. For workers' compensation RREs, no reporting of ORM is necessary if all of the following criteria are met:

- The claim is for "medicals only"
- The lost time, if any, was not more than 7 calendar days
- All payments were made directly to the medical provider
- Total payments do not exceed $600.00

In terms of cases where there was an issuance of a TPOC (settlement or award by judgment or decree), the review thresholds are subject to a phase-out schedule. For TPOCs dates of 7/1/09 to 12/31/10, no reporting is necessary if the total payment to the claimant is between $0 to $5,000. For TPOCs dates of 1/1/11 to 12/31/11, no reporting is necessary if the payment is between $0 to $2,000. For TPOCs dates of 7/1/12 to 12/31/12, no reporting necessary if the TPOC is between $0 to $600. Where multiple TPOCs have been reported by the same RRE on the same record, the combined TPOC amounts must be considered in determining whether the reporting threshold applies. CMS has warned that these exceptions are review thresholds only and do not constitute safe harbors.

The failure to comply with the reporting requirements will result in a civil money penalty of $1,000 per day per claimant. The law becomes effective on July 1, 2009, but the actual reporting has been delayed to allow RREs to, among other things, get up to speed on the technical aspects of reporting and to allow CMS time to iron out the kinks in the reporting procedure. The implementation timeline has been altered by CMS a number of times. Accordingly, RREs should be sure to check on the CMS website for updates. In the meantime, the timeline for liability and workers' compensation RREs is currently as follows:

- RRE Registration will take place from May 1 through September 30, 2009
- Testing of claim input files will be from January 1, 2010, through March 31, 2010
- Testing for Query Access functions will begin on July 1, 2009
- Production files (with data collected as of July 1, 2009) can be submitted beginning on January 1, 2010
- As of April 1, 2010, the system will be in place and operational

It should be noted that, though CMS contains—within its title—the Medicaid program, the MIR does not apply to cases involving a Medicaid-eligible claimant if that claimant is not also a Medicare beneficiary. Medicaid is a medical-assistance program that is administered by State governments, with Federal funding assistance, to pay for health care for people of all ages who fall within certain eligibility requirements, one of which is having low-income. In Maine, the Medicaid program operates under the name of MaineCare. There are lien concerns with respect to this program under State law, but they are separate and distinct from the MIR law. In addition, RREs are reminded that the requirements of the MIR laws operate in tandem with the requirements imposed under the general Medicare Secondary Payer law, which means that RREs should also think about conditional payments and the recovery aspects of CMS as well as address Medicare set-aside (MSA) issues that may exist in any given case.

For a full discussion of the MIR and its requirements, RREs are encouraged to consult CMS's website at https://www.cms.hhs.gov/MandatoryInsRep/. In particular, RREs should review the User Guide, a 180-page manual that was published by CMS on March 16, 2009. New versions of the User Guide will be re-published from time to time, with interim updates and changes to the Guide provided through "Alerts." In fact, a new version of the User Guide is expected in mid- to late-June 2009. RREs are also encouraged to sign-up for email alerts on the CMS website to ensure they receive up-to-date information on the MIR process.

Those with questions or concerns about the Mandatory Reporting laws should feel free to contact Doris Champagne or Jonathan Brogan. ☐

Norman Hanson & DeTroy 2009 Book Prize goes to Maranacook High Student

In a recent Blaine House ceremony attended by Governor Baldacci, Adrian Kendall presented Devin Gerrity, of Maranacook High School, with the 2009 Norman, Hanson & DeTroy Book Prize. The Book Prize is awarded each year to the Maine German Student of the Year, as selected by the Maine Chapter of the American Association of Teachers of German. The firm has been proud to honor Maine's top German students in past years, but Devin is a standout - even in his field of accomplished award winners.

Devin's teachers said it best: "Devin Gerrity is the most enthusiastic language learner I've ever met. He has taken Spanish 1-3, French 1-5 and German 1-4. In fact Devin by-passed German 3 and went straight into German 4 because of his willingness to study independently. He can often be seen working with self made verb flashcards or working on grammar exercises just for fun. Devin is motivated by the fact that he will depart for Europe this summer, where he will spend a year working as a teacher aide in a German school for handicapped children." In fact, Devin was one of over 100 candidates for the teacher's aide position, most of whom were local German students.

Congratulations to you, Devin, on your achievement and your dedication to public service. We all wish you the best of luck in your travels and future academic career! ☐

Three Recent Law Court Decisions

By David P. Very

"Direct evidence" of causation required rather than "reasonable inference."

Traditionally, at the summary judgment stage, the non-moving party is entitled to the full benefit of all favorable inferences. This would include a "reasonable inference" as to proximate cause. In a split four-to-two decision, over a vigorous dissent, the majority of the Court retreated from this reasonable inference standard requiring direct evidence of proximate cause to survive summary judgment.

In *Addy v. Jenkins, Inc.,* 2009 ME 46 (April 30, 2009), Addy was injured when he fell while working as a subcontractor for Jenkins. Jenkins had provided and erected staging to be used during the project. Jenkins had not installed safety equipment to the staging on which Addy was assigned to work. Addy fell on the first day of work and asked Jenkins to install the safety equipment. Jenkins failed to do so. Addy fell again and sustained injury.

Addy filed suit against Jenkins and, at his deposition, testified that he fell to the ground while climbing down the staging. He did not remember how he fell or what caused him to fall. Specifically, he did not recall whether his fall was connected in any way to the absence of the safety equipment. The Superior Court entered summary judgment in favor of Jenkins based on its conclusion that Addy had provided insufficient evidence as to a breach of its duty of care and that any such breach was the proximate cause of Addy's injuries.

On appeal, the Law Court first held that Addy did present sufficient evidence that Jenkins owed and breached a duty to him to provide a safe workplace environment.

The Law Court then addressed whether Addy had presented sufficient evidence that Jenkins' breach of its duty of care was the proximate cause of Addy's fall. The Court held that Addy failed to establish a connection between any defect in the staging and the injury he suffered. The Court stated that Addy "presented evidence of only from *where* he fell, rather than *how* he fell." As a result, any finding that Addy's fall was caused by a defect in the staging, the Court held, would be based on speculation or conjecture. The majority of the Law Court therefore upheld the grant of summary judgment in favor of Jenkins.

Justices Silver and Levy dissented. The dissenters stated that the Court "suggests" that a party must present direct evidence of proximate cause in order to withstand summary judgment, and that reasonable inferences are no longer permissible. The dissenters also indicated that the majority "suggests" that a plaintiff who cannot remember an otherwise unwitnessed accident cannot rely on any inference, however reasonable, to obtain relief. The majority decision simply concluded that Addy's lack of direct evidence of causation, particularly his lack of memory about the specifics of the fall, required summary judgment and provided no discussion whatsoever of the role of inference. The minority indicated that this would reflect a "significant departure from our prior case law, it would create a new and heightened burden with respect to the causation element of tort law, and it would put plaintiffs at a disadvantage for a lack of memory that may itself be an inextricable part of the accident and the injury."

This does indeed appear to be a significant case regarding the evidence required to establish proximate cause. In this case, the majority of the Court held that there was sufficient evidence

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that the staging was unsafe and that the defendant had breached its duty of care to the plaintiff. The Court also held that there was sufficient evidence that the plaintiff had fallen from this staging. For the Court to then go on to state that because the plaintiff could not remember "how" he fell, summary judgment was appropriate, is indeed a significant departure from cases that would allow the Court, and the jury, to reasonably infer that it was the lack of safety devices that caused the plaintiff's fall.

Employer liability for off hours/premises conduct

In *Fortin v. Roman Catholic Bishop of Portland,* 2005 ME 57, 871 A.2d 1208, the Law Court recognized for the first time the tort of negligent supervision in cases where there was a "special relationship" between the plaintiff and the defendant. In that case, Justice Alexander had dissented expressing concern that the reasoning of the opinion would open the door to a wide range of efforts to make businesses, professions, and individuals responsible for employees' improper acts outside the course and scope of the employment or agency. According to Justice Alexander, his prediction from four years ago has come true.

In April of 2000, Plaintiff Paul Dragomir was admitted to the Spring Harbor Hospital for treatment of a mental illness and drug and alcohol abuse. Eric Richardson, a social worker at Spring Harbor, provided therapy to Dragomir both as an inpatient and as an outpatient. In May of 2000, Dragomir and Richardson began a sexual relationship, which lasted until July of 2001. Richardson also supplied Dragomir with illegal drugs and alcohol. All social and sexual encounters between the two occurred off hospital premises. In July of 2001, Dragomir informed Spring Harbor of his relationship with Richardson. Richardson immediately resigned and eventually pled guilty to gross sexual assault with a mental health patient and was incarcerated.

Dragomir filed a notice of claim against Richardson and Spring Harbor. The Superior Court granted Spring Harbor's motion for partial summary judgment on the grounds that it was not vicariously liable for Richardson and further dismissed the plaintiff's claim against Spring Harbor for the negligent supervision of Richardson.

On appeal, in *Dragomir v. Spring Harbor Hospital,* 2009 ME 51 (May 14, 2009), the Law Court first addressed whether Spring Harbor was vicariously liable for Richardson. The Court held that an employer may only be liable for the actions of its employees if the actions were taken in the "scope of employment." The Law Court held that the sexual acts did not occur substantially within the authorized time and space of Dragomir's treatment and that Richardson's conduct was not the kind of conduct he was employed to perform. As a result, the Law Court affirmed the Superior Court's order granting summary judgment to Spring Harbor as to Dragomir's claim of vicarious liability.

The Court then turned its attention to the claim for negligent supervision. Citing its prior decision in *Fortin,* the Law Court clarified that fiduciary relationships in which there exists a great disparity of position and influence between the parties would qualify as a "special relation" for the purposes of a negligent supervision claim. The Court held that such a determination must be made on a case-by-case basis, unless the nature of a given relationship is such that there is always certain to be a great disparity of position and influence.

In the instant case, the Court noted that a hospital's relationship to a psychiatric patient suffering from and being treated for a mental illness or a vulnerable psychological condition, is certainly one that is marked by a great disparity of position and influence between the parties. The Court further noted that the Plaintiff alleged that he was a vulnerable, impaired patient of a mental health hospital, and that he was unable to protect himself from a hospital employee. The Court therefore held that these facts, if proven, were sufficient to constitute a "special relationship" for the purposes of a negligent supervision claim. The Law Court therefore remanded this action to the Superior Court to determine whether the Plaintiff can prove facts sufficient to demonstrate that a special relationship existed between him and Spring Harbor *and* whether Richardson's actions were foreseeable to the hospital and that it failed to supervise Richardson accordingly.

Justice Alexander, joined by Justice Clifford, dissented. The dissent stated that the majority fundamentally altered and dramatically expanded responsibility for improper acts of employees and agents occurring outside of the course and scope of the employment or agency. With this opinion, the dissenters argued that businesses, professions, and individuals are at risk of suit and exposed to damages payments for acts by employees after hours and away from the employer's premises that have nothing to do with furthering the objectives of the business, professional, or individual employment activity.

Mark Lavoie and Chris Taintor represent Spring Harbor Hospital in this action.

Due process concerns with service by publication.

In *Gaeth v. Deacon,* 2009 ME 9 (February 3, 2009), the Law Court expressed several concerns regarding service by publication.

In June of 2004, William Gaeth, a resident of Lincoln County, filed a complaint in the Superior Court alleging that Daniel Deacon struck Gaeth in the face with his fist while both were students at Colby College. In September of 2004, Gaeth filed a motion for service by publication asserting that he had conducted a computer search to find information on Deacon, that he was given an address for Deacon in Massachusetts by both Colby College and the Post Office, and that service was attempted in Massachusetts, but the sheriff was unable to gain entry into the apartment building. Based on that evidence, the Superior Court granted the motion and ordered publication in the *Lincoln County News*, a weekly newspaper, for a period of three successive weeks. Gaeth sent the Court's order and the notice of publication by mail to Deacon's last known address in Massachusetts and both were returned with no forwarding address. In January of 2005, a default judgment was entered and a hearing on damages was conducted in September of 2005.

In an attempt to collect on the judgment, Gaeth sent Colby College a subpoena requesting any and all files in Colby's possession regarding Daniel Deacon. In response to this subpoena, the College learned of Deacon's new address in Massachusetts and sent Deacon a letter. Deacon immediately retained counsel and filed a motion for relief from judgment arguing that the judgment was void because he did not receive notice and because service was not proper. That motion was denied by the Superior Court and Deacon appealed.

On appeal, the Law Court noted that under Maine law and federal constitutional dictates of due process, service of process affected in a manner most reasonably calculated to apprise a

defendant in fact of the proceeding is necessary to ensure that the Court in which an action is initiated gains personal jurisdiction over the parties. The Court noted that any judgment by a Court lacking personal jurisdiction over a party is void. The Court stated that while receipt of actual notice is not constitutionally mandated, an adequate attempt at actual notice is required.

The Law Court stated that the practice regarding service by publication as a means to achieve notice of the commencement of a suit developed at a time when newspapers were the only means of print mass communication, and when newspapers were more widely and intensely read than is now the case. The Court stated that much has changed in the way of life that gave rise to the rules and practices regarding service by publication. The Court noted that fewer people now read print newspapers and those who do are likely to read them less intensely because an increasingly greater portion of the population obtains more of its information through television, the internet, and other electronic media. Because service by publication has become less likely to achieve actual notice of a lawsuit, the Law Court held it is also less likely to meet the requirements of due process. Accordingly, the Law Court stated that because of the recent societal changes, service by publication in a newspaper should occur "only" when notice "cannot" be accomplished by other means.

In the instant case, the Law Court agreed with Deacon that service by publication in the *Lincoln County News* was clearly insufficient. Deacon's only connection with Maine was his previous attendance at Colby, and service by notice in a weekly newspaper published in Lincoln County, would be highly unlikely to give him actual notice of the lawsuit. Although the Plaintiff and the lower court had technically complied with the rules, the Law Court held that it did not meet the requirements of due process. As a result, the Law Court vacated the default judgment and remanded to the Superior Court for further proceedings.

Peter DeTroy and Russell Pierce represent Daniel Deacon in this matter. ☐

Briefs/Kudos

HANNAH BASS has been invited to serve on the Maine Women's Fund Board of Trustees commencing this fall. The Fund is a public foundation with a mission to improve the lives of women and girls in Maine, and currently has a special focus on the economic security of women. In 2008, the Fund awarded $130,000 in social change grants to eleven organizations in Maine promoting lasting social change.

JOHN VEILLEUX was recently elected to a fourth term as a member of the Casco Bay Hockey Association Board of Directors. He was also chosen to serve as CBHA's coaching director for the Association's more than 150 coaches.

STEVE MORIARTY spoke at a seminar in early May sponsored by Lorman Education Services focusing on workers' compensation practice and procedure.

DARYA HAAG has joined the firm as a summer associate. A second year student at the University of Maine School of Law, Darya is a native of Belarus and moved to the United States several years ago. Darya has a special interest in international law and business law and previously worked as an intern at the Maine International Trade Center. She is currently engaged in a research project exploring intellectual property rights protection available to Maine companies exporting products to China.

CHIP HEDRICK spoke on the topic of "Protecting Your Assets" at the Community Senior Fair in Lewiston, an event sponsored by Community Credit Union.

AARON BALTES was selected by the Board for the Children's Museum & Theater of Maine to serve on its Executive Committee.

STEVE MORIARTY clinched 1st place in his age division at the 4th annual Pineland Farms Trail Challenge 15.5 mile cross country race in May. Steve also competed in the annual Mount Washington Road Race on June 20, finishing 181st out of a field of 917 competitors.

JONATHAN BROGAN has been elected a Fellow of the International Society of Barristers, an honor society of outstanding trial lawyers chosen by their peers on the basis of excellence and integrity in advocacy. Society members are elected by the Society's Board of Governors after inquiry to other Barristers in the nominee's region and to judges before whom the nominee has tried cases. ☐

Workers' Compensation- Law Court Decisions

By Stephen W. Moriarty

Discrimination

Several years ago the Law Court spoke definitively on the issue of whether termination of an injured worker from employment constitutes a prohibited act of discrimination under §353. In *Jandreau v. Shaw's Supermarkets, Inc.,* 2003 ME 134, 837 A.2d 142, the claimant sustained an occupational injury which resulted in a series of physical limitations which prevented her from returning to work. The employer had in place a long-standing policy which applied neutrally across the board and which provided for termination for employees who have been out of work for more than six months for any reason. The claimant was terminated in accordance with that policy when her restrictions could not be accommodated, and she filed a Petition to Remedy Discrimination.

The presiding hearing officer found that although the termination policy was facially neutral, its application to the claimant was an act of discrimination because the disabling restrictions were the result of a recognized occupational injury. In reversing the decision, the Court held that the Workers' Compensation Act does not "require an employer to keep an employee on the books indefinitely when the employee can no longer meet the requirements of a job". Finding that the six-month time period set forth within the absenteeism policy was a reasonable amount of time to enable the employer to make non-discriminatory decisions, the Court found that the termination was based upon legitimate employment considerations. In the years since *Jandreau* was decided, it has been generally understood that bona fide employment action can be taken against an injured worker without fear of potential liability for a workers' compensation discrimination claim.

However, the same essential issue surfaced recently in a case that was ultimately resolved by the Court. In *Lavoie v. Re-Harvest, Inc.,* 2009 ME 50 (May 12, 2009), the claimant sustained an occupational injury and was unable to perform any type of work whatsoever, including a light duty job that was specifically tailored for him. The disability appeared at the time to be indefinite. As a result, the employee was terminated less than four weeks following the injury, and payment of benefits for total incapacity was voluntarily initiated. Although the claimant ultimately recovered work capacity and eventually secured full-time employment at a comparable level of earnings with another employer, he filed a Petition to Remedy Discrimination.

The presiding hearing officer noted that the employer had fewer than twenty employees, and therefore had less capability to accommodate individuals with significant limitations. Nevertheless, the hearing officer found that the employer had discriminated against the employee by firing him as the result of restrictions caused by the occupational injury. Among the reasons cited by the hearing officer were the fact that there was no specific written policy regarding termination, the ultimate duration of the incapacity was unknown at the time of termination, and a significant consequence of termination was the loss of employer-provided health insurance. Accordingly, the discrimination claim was granted.

The Law Court granted the employer's appeal in a clear and well-reasoned decision. Writing for a unanimous Court, Chief Justice Saufley noted that when an occupational injury occurs, an employer is required to act promptly to pay compensation and provide medical services, and "to otherwise comply with

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the Workers' Compensation Act". However, the Court explicitly refused to "read into the Workers' Compensation Act an additional requirement that employers maintain people who are completely unable to work on their employment rolls or face claims for discrimination under the Act". The Court found no duty to maintain employment status of injured employees who are unable to work. As the Court emphatically ruled:

> It simply cannot be the law that an employer necessarily commits discrimination whenever the employer terminates an employee whose injuries prevent him from working The focus of the Workers' Compensation Act is to ensure that employees who are unable to work, or are limited in that capacity, as a result of a work-related injury receive compensation for lost wages. The purpose has never been to guarantee continued employment status to an employee who cannot work.

Although the Court noted that the passage of time between the injury and the termination had been fairly brief, it found no evidence that the employment

action was substantially or significantly rooted in the employee's assertion of rights under the Act.

Having found no improper conduct on the part of the employer, the Court simply vacated the decision of the hearing officer and did not remand for any further proceedings. The significance of the *Lavoie* decision cannot be overemphasized. Even in the absence of rules or policies regarding termination (which, incidentally, are neither required by the Act nor the Board's rules), an employer is not required to maintain employment status indefinitely and may terminate individuals who are unable to work by virtue of an occupational injury without triggering claims for discrimination under §353.

Gradual injuries

Effective January 1, 1973 the Legislature deleted the former "injury by accident" requirement which had limited the scope of coverage of the Act to traumatically-induced injuries. From that point forward, the protection of the Act extended to all types of personal injuries arising out of and in the course of employment. Three years later, in the landmark decision of *Ross v. Oxford Paper Company,* 363 A.2d 712 (Me. 1976), the Law Court first recognized the compensability of gradual physical injuries, and ever since the gradual injury has been a key fixture of the overall workers' compensation system.

Determination of the correct date of injury is seldom an issue in a case involving a traumatic injury, but the same is not necessarily true in a gradual injury claim. The Law Court has defined a gradual injury as "a single injury caused by repeated, cumulative trauma without any sudden incapacitating event." *Derrig v. Fels Company,* 1999 ME 162, ¶7, 747 A.2d 580, 582. In the absence of a single and clearly definable event, it can obviously be difficult to determine when a gradual injury "occurs" for purposes of the Act. In effect, the date of injury in a gradual claim is a medical/legal fiction which is nevertheless necessary for determining the identity of the employer, the applicable average weekly wage, and the commencement of the time period for giving notice and for filing a claim.

In a recent decision the Court wrestled once again with the proper method for determining the date of injury in a gradual claim. In *Jensen v. S. D. Warren Company,* 2009 ME 35 (April 7, 2009), the claimant had sustained a traumatic injury in 1993 but had continued to work until January 2004 when he experienced a flare of symptoms. He elected to take a severance package and did not return to work. Approximately two and a half years later, he consulted with an attorney concerning an application for social security disability benefits, and learned that he may have sustained a second (but gradual) occupational injury to his back in 2004 as the cumulative result of heavy physical activity.

He filed a Petition for Award based upon the 1993 and 2004 injuries, and the earlier claim was denied on grounds of statute of limitations. However, the presiding Hearing Officer found that the claimant had sustained a compensable gradual injury in January 2004 and awarded benefits for an initial period of partial incapacity followed by ongoing benefits for total incapacity. The employer appealed from that determination.

In a lengthy opinion the Court summarized its decisions over the years in which it had attempted to define the occurrence of a gradual injury. Ultimately, the Court relied upon its original holding in *Ross*, supra, and ruled "that the date of injury for a gradual injury is the date on which the injury manifests itself". Of course, it is not necessarily clear when an injury may be found to be "manifest". The possibility of "manifestation" undoubtedly includes the date of commencement of lost time and the date of initiation of medical treatment, among other options. However, this is an issue which is highly fact-intensive and the point of manifestation is likely to be disputed in litigation. Because it was not clear in *Jensen* whether the point of manifestation coincided with the last day of work, the court remanded the case to the Board for reconsideration of the correct date of injury.

Significantly, the Court also held that the time period for both giving notice and for filing a claim may not begin to run until such later point as an employee becomes "aware" of the occurrence of the injury. Previously the date of awareness was considered to mark the date of injury, but "manifestation" and "awareness" may occur at different times. Both the duty to give notice under §303 and the obligation to file a timely claim under §306 may be excused on grounds of a mistake of fact. Whether an employee remains mistaken after an injury has become manifest will also depend upon the facts of each case and will be closely examined by counsel to the parties and the presiding hearing officer.

The *Jensen* decision also addressed the scope of the attorney-client privilege and the extent to which such communications may be confidential. The claimant testified that he first became aware of the possibility of the occurrence of a gradual injury following a conversation with his attorney. However, when counsel for the employer attempted to examine the employee on the details of the conversation, the hearing officer sustained an objection to further inquiry based upon the attorney-client privilege. The Law Court reversed and ruled that the privilege had been waived.

The Court held that the privilege can be waived when a "significant part" or a "key element" of a confidential communication has been disclosed. Because the employee admitted that his knowledge of a possible gradual injury was acquired during consultations with his attorney, the Court found that the attorney-client communication was no longer confidential and that the privilege had therefore been waived. On remand, counsel for the employer may examine the employee about what he learned while speaking with his attorney and how he then became aware that he may have sustained a gradual injury. □

NHD Plays Role in Purchase of Portland Press Herald

On June 15, 2009, Paul Driscoll, a member of the firm specializing in finance and commercial real estate, successfully represented a consortium of investors lead by Rich Connor and H.M. Capital Partners, LLC from Ft. Worth, Texas in acquiring all of the Maine assets of Blethen Maine Newspapers, Inc. Paul worked with Kelly Hart & Hallman, which served as lead counsel for the acquisition. Blethen is a Washington corporation and a subsidiary of the Seattle Times Company and operated the *Portland Press Herald*, the *Maine Sunday Telegram*, the *Kennebec Journal* and a number of other more regional newspapers. Blethen sold its assets to MaineToday Media, Inc., a Delaware corporation, and MaineToday will take over the operation of the former Blethen newspaper business and will run the newspapers under the same names. Paul acted as real estate counsel for the deal and organized three Maine limited liability companies, each a subsidiary of MaineToday, to acquire seven parcels of real estate owned by Blethen from which it conducted its newspaper operations. These properties consisted of two buildings at 390 Congress Street – the familiar headquarters of the newspaper – as well as the old printing press building at 385 Congress Street next door to City Hall. The other properties included the relatively new operations building on Gannett Drive in South Portland, the Kennebec Journal building in Augusta and properties in Waterville and Skowhegan. The June 15 closing capped a 14 month long process under which Blethen sought to dispose of all of its Maine assets, including all of its newspaper operational assets and real estate. RBS Citizens Bank, N.A., through its Portland branch, financed MaineToday's acquisition of the Blethen assets after the principals of MaineToday had also made significant equity contributions in support of the purchase effort. With the closing completed, MaineToday intends to make substantial improvements in the Portland Press Herald's newspaper operations to revitalize its operations and those of its related newspapers. □

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

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